No. 22591

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit



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| THOMAS FRED WALLACE and NORMA MAY WALLACE, husband and wife, | ) |
| Appellants, | ) |
| v. | ) |
| EMPLOYERS CASUALTY COMPANY, | ) |
| Appellee. | ) |

On Appeal from the United States District Court

For the District of Arizona

# REPLY BRIEF FOR APPELLANTS

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*Attorney for Appellants*

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*REPLY BRIEF FOR APPELLANTS*

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Appellee's brief argues that because of the rule of *Erie Railroad Company v. Thompkins*, 304 U.S. 64, 82 L. Ed. 1188, requiring the Federal Courts to apply the Arizona substantive law, and the pronouncements of the Arizona Supreme Court in *Stephens-Franklin Motors, Inc. v. Lambros*, 71 Ariz. 389, 228 P.2d 267; *Patterson Motors, Inc. v. Cortez*, 2 Ariz. App. 298, 408 P.2d 231; and *Price v. Universal C.I.T. Credit Corp.*, 102 Ariz. 227, 427 P.2d 919, that the owner of the automobile on the date of the collision between

the appellants and Kenneth Russell Lewis, who was employed by Potts Motors of Phoenix, Arizona, was Potts Motor Company and not appellee's insured, Olson Motors of Williams, Arizona. As such, the automobile dealer's policy of liability insurance insuring Olson Motors does not apply. The apparent reason being that under the Arizona cases cited, ostensible ownership had passed to the buyer even though the Arizona Certificate of Title Act requires certain procedures to be followed before a title is transferred to the new owner. Then, going one step further, appellee cites A.R.S. § 28-1170(B), which talks about the requirements of an *owner's* policy of liability insurance and infers that since as between the automobile buyer (Potts Motor Company) and the automobile seller (Olson Motors), title passed prior to any compliance with the requirements of the Arizona Motor Vehicle Transfer of Title Act, that the public policy decisions referred to in appellants' brief, *Schecter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136, and *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145, do not apply.

Appellants can find no fault with the rule in *Erie v. Thompkins*, but the problem with the above argument is that the Arizona Supreme Court, in its effort to protect

the public through the pronouncements of its decisions starting with *Schecter v. Killingsworth, supra,* and *Jenkins v. Mayflower Insurance Exchange, supra,* have stated the public policy in the State of Arizona is such that a policy of liability insurance inures mainly to the benefit of the insured person. In *Jenkins* the court specifically refused to consider distinctions in language which might appear in a policy called a "motor vehicle liability policy" or an "automobile liability policy" or a "policy of insurance," the court saying:

> "Where the basis upon which this act has been declared constitutional is, 'preventing financial hardship and possible reliance upon the welfare agencies,' we cannot constitutionally allow artful distinctions between 'motor vehicle liability policy,' 'automobile liability policy' or 'policy of insurance' to defeat the purpose of the act. To do so would make our opinion in Schecter v. Killingsworth, supra, a sham.
>
> "We hold, therefore, that the omnibus clause is a part of every motor vehicle liability policy, by whatever name it may be called."

After those two decisions, the Arizona Supreme Court had many additional occasions to redefine the law in Arizona as it related to the pronouncements in both *Jenkins* and *Schecter.* Those subsequent decisions squarely show

that the public policy of Arizona was such that niceties of technical ownership of the automobile would not detract from the ability of an insured person to obtain the benefits of the policy of insurance.

In *Sandoval v. Chenoweth* (May 25, 1967), 102 Ariz. 241, 428 P.2d 98, a default judgment had been taken against the tort feasor and no notice of any nature was given to the insurance carrier. As between the tort feasor, insured, and the insurance company an actual breach of the policy terms existed. Notwithstanding, the Arizona court held that because of the established public policy stated in *Schecter*, and notwithstanding any acts on the part of the driver or his relationship with the insurance carrier, the public policy of the State would still be carried out. The court there quoted from *Wildman v. Government Employees' Ins. Co.*, 48 Cal. 2d 31, 307 P.2d 359, stating:

> "* * * [T]he *entire* automobile financial responsibility law must be liberally construed to foster its main objective of giving 'monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others.'"

The next pronouncement of the Arizona Supreme Court came in *Dairyland Mutual Insurance Company v. Andersen*,

102 Ariz. 515, 433 P.2d 963 (1967). This was a garnishment proceedings against the insurance company with the insurer contending that its policy applied only in the event that the automobile was owned by the driver and that with respect to a non-owned automobile, its insurance was excess. The insurer was attempting to draw a distinction between an owner's policy of liability insurance and any other type of liability insurance policy. The court did not allow such a distinction to be made, holding that if the automobile was used by the driver with permission, the policy of insurance was available to the injured party.

It is submitted that the public policy of Arizona with respect to insurance proceeds being used for the benefit of those persons who may suffer financial hardship which may result by the use of automobiles by financially irresponsible persons is so strongly ingrained in the Arizona decisions that the niceties of whether or not the title passed immediately upon the transfer of the car to Lewis or passed at such time as all the requirements were met with respect to the right of appellants herein to recover must be resolved in favor of the appellants.

See further the cases of *Canal Insurance Company v. State Farm Insurance Companies*, 7 Ariz. App. 102, 436 P.2d

494; and *Harleysville Mutual Insurance Co. v. Clayton*, 440 P.2d 916 (May 8, 1968).

If this were an action between the buyer and seller of the car, the appellee's argument could be a favorable one but when an injured third person is involved, the public policy of the State of Arizona takes over, and the insurance on the automobile covers the injured person.

It should be noted that other courts have reached similar decisions to the one which appellants request of this court. And this analogy has been based on the duties required of their insured versus the rights and liabilities as between buyer and seller from a commercial sales view. Were the requirements of the Arizona statutes, specifically A.R.S. § 28-314, such as to make the buyer (Potts Motor Company) perform certain acts with respect to the registration in order to transfer title, the appellee's position might be stronger. However, A.R.S. § 28-314 specifically requires the transferor to do the various and necessary recited acts in order to transfer the certificate of title. This was the distinction relied on by the Missouri Court in *Sabella v. American Indemnity Company*, 372 S.W.2d 36. In *Sabella*, a garnishment action was instituted against a garage liability policyholder's insurer

by a plaintiff who had recovered a judgment against the purchaser of an automobile from the named insured. The purchaser had not received the certificate of title through the mail for about one week after he bought the automobile from the dealer and after the collision with the plaintiff had occurred. The court held that the policy of insurance inured to the benefit of the injured party because the previous owner, the insured, had not done or completed the actions which the insured was supposed to do, and as such, the insured's liability carrier could not escape the requirements of paying under the policy even though as between the parties ostensible title to the motor vehicle may have passed.

So also did the Fourth Circuit hold in the 1965 case of *Clouse v. American Mutual Liability Insurance Co.*, 344 F.2d 18. There, construing South Carolina law, the court held that the dealer's policy applied until all the requirements of the act had been complied with as the burden was upon the automobile dealer to comply with the required acts.

See also *Allstate Insurance Co. v. Hartford Accident & Ind. Co.*, 311 S.W.2d 41, where the dealer's policy of insurance was held primarily liable as between the dealer's policy and the buyer's policy when the requirements of the Missouri

statutes were not complied with.

A garage liability policy should be construed strictly against the insurer writing it in case of doubt. See *Constitutional Indemnity Co. v. Lane*, 67 F.2d 433 (C.C.A. 6th 1933). The public policy of Arizona requires this court to resolve this action in favor of the appellants who are the injured innocent parties, and not in favor of the automobile dealer's insurance carrier that wishes to evade liability based on a legal nicety in sales law as between the buyer and seller of an automobile.

It is respectfully submitted that this court should reverse the District Court below and enter judgment in favor of the appellants.

Respectfully submitted,

/s/ Harold Goldman

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Harold Goldman

Harold Goldman

AFFIDAVIT OF SERVICE BY MAIL

HAROLD GOLDMAN, being duly sworn, says that he deposited three (3) copies of the foregoing Reply Brief for Appellants in final printed form in the United States Post Office in the City of Phoenix, State of Arizona, enclosed in an envelope duly addressed to Mr. Ralph E. Hunsaker, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, 1800 First Federal Savings Building, Phoenix, Arizona 85012, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States Post Office in the City of Phoenix, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 5th day of July, 1968.

/s/ Harold Goldman

Harold Goldman

Subscribed and sworn to before me
this 5th day of July, 1968.

/s/ Marvel A. Braun

Notary Public [SEAL]

My commission expires December 8, 1968